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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WCCO RADIO, INC., A DIVISION OF MIDWEST COMMUNICATIONS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the appellate court ignore fundamental labor law principles in concluding that individual personal service contracts and the amounts of overscale wages must be unconditionally disclosed to a union even though such individually negotiated contracts and wages are not collectively bargained and even though the union advised its own members that such information would be revealed only to the union's executive secretary and not to any union members (or the union negotiating committee)?

2. Did the appellate court ignore fundamental labor law principles in concluding that the employer had legitimate interests in keeping the requested information confidential such that unconditional disclosure of the information was not required and such that the offers of limited access made by the employer met its duty to bargain?

3. Did the appellate court ignore controlling state interpretation of Minn. Stat. Ch. 325C (the Uniform Trade Secrets Act) by determining that the personal service contracts and the amounts of overscale wages are not trade secrets or confidential information entitled to protection from unconditional disclosure?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below (and the parties before this Court are) WCCO Radio, Inc., and the respondent National Labor Relations Board. The Twin Cities Local of the American Federation of Radio and Television Artists was the charging party before the National Labor Relations Board.

The parent company of petitioner is Midwest Communications, Inc. There are no petitioner affiliates or subsidiaries (other than wholly owned subsidiaries).

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties and Rule 28.1 List	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
I. The Eighth Circuit's conclusion that the information requested was relevant notwithstanding the union's own report to its members (a) ignores the fundamental and important labor law principle that the union's executive secretary is merely an agent for the union membership with no independent right of his own to information, (b) ignores other fundamental labor law principles and (c) conflicts with precedent holding that a union's public pronoucements may be binding	7
II. The Eighth Circuit's conclusion that the employer did not have any legitimate interests in keeping confidential the information requested which interests outweighed the union's professed need for unconditional disclosure ignores fundamental labor law principles and the confidential and trade secret nature of the information	12
Conclusion	16

TABLE OF AUTHORITIES

Cases: Page

Acri v. International Association of Machinists & Aerospace Workers, 781 F.2d 1393 (9th Cir. 1986) *cert. den.* 107 S.Ct. 73, 93 L.Ed.2d 29 9

Adkins v. General Motors Corp., 573 F.Supp. 1188 (S.D. Ohio 1983) *aff'd* 769 F.2d 330 (6th Cir. 1985) 11

Anderson v. United Paperworkers International Union, 641 F.2d 574 (8th Cir. 1981) 9, 10

Blanchard v. Johnson, 532 F.2d 1074 (6th Cir. 1976), *cert. den.* 429 U.S. 834 11

Boulevard Plaza Corp. v. Campbell, 254 Minn. 123, 94 N.W.2d 273 (1959) 9

Deboles v. Trans World Airlines, Inc., 552 F.2d 1005 (3rd Cir. 1977) *cert. den.* 434 U.S. 837 (1977) 10

Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979) 12

E. I. DuPont de Nemours & Co. v. NLRB, 744 F.2d 536 (6th Cir. 1984) 7

Electro-Craft Corp. v. Controlled Motion, Inc., 332 N.W.2d 890 (Minn. 1983) 15

Gordon Employment, Inc. v. Jewell, 356 N.W.2d 738 (Minn. App. 1984) 15

Karahalios v. Defense Language Institute Foreign Language Center Presidio of Monterey, 613 F.Supp. 440 (D.C. Cal. 1984), *rev'd on other grounds,* 821 F.2d 1389 (9th Cir. 1987), *pet. cert. filed* 56 U.S.L.W. 3340 (October 7, 1987) (No. 87-636) 10

	Page
Nienaber v. Ohio Valley Carpenters District Counsel, 652 F.2d 1284 (6th Cir. 1981)	11
NLRB v. Carpenters Local 608, 811 F.2d 149 (2nd Cir. 1987)	10
NLRB v. IBEW, Local 575, 773 F.2d 746 (6th Cir. 1985)	10
NLRB v. Local 282, Intern. Broth. of Teamsters, 740 F.2d 141 (2nd Cir. 1984)	9, 10
NLRB v. Winter Garden Citrus Products Cooperative, 260 F.2d 913 (5th Cir. 1958)	8
Oil, Chemical & Atomic Workers Local Union v. NLRB, 711 F.2d 348 (D.C. Cir. 1983)	7, 12
Silverman v. Major League Baseball Players Relations Committee, 516 F.Supp. 588 (S.D.N.Y. 1981)	11
Village of Burnsville v. Westwood Co., 290 Minn. 159, 189 N.W.2d 392 (1971)	9
Warehouse Union, Local 860 v. NLRB, 652 F.2d 1022 (D.C. Cir. 1981)	9
Western Massachusetts Electric Co. v. NLRB, 589 F.2d 42 (1st Cir. 1978)	8
Statutes:	
National Labor Relations Act, §§8(a)(1) and (5), 29 U.S.C. §§158(a)(1) & (5)	2
§9, 29 U.S.C. §159	9
Labor-Management Reporting and Disclosure Act §101, 29 U.S.C. §411	11
Minnesota Uniform Trade Secrets Act, Minn. Stat. §325C.01, Subd. 5	2, 14

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vs.

NATIONAL LABOR RELATIONS BOARD,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioner WCCO Radio, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on April 11, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 844 F.2d 511 and is reprinted in the appendix hereto, pp. A-33 to A-42, *infra*.

The decision of the National Labor Relations Board is reported at 282 NLRB No. 159. It is reprinted in the appendix hereto, pp. A-1 to A-33, *infra*.

JURISDICTION

On April 11, 1988, the Eighth Circuit affirmed a decision of the National Labor Relations Board. The Eighth Circuit had jurisdiction pursuant to 29 U.S.C. §§160(e) and (f).

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

National Labor Relations Act §§8(a)(1) and (5), 29 U.S.C. §§158(a)(1) and (5).

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

The Minnesota Uniform Trade Secrets Act, Minn. Stat. §325C.01, Subd. 5.

"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The existence of a trade secret is not negated merely because an employee or other person has acquired the

trade secret without express or specific notice that it is a trade secret if, under all the circumstances, the employee or other person knows or has reason to know that the owner intends or expects the secrecy of the type of information comprising the trade secret to be maintained.

STATEMENT OF THE CASE

Petitioner ("WCCO") operates an AM radio station in Minneapolis, Minnesota. The Twin Cities Local of the American Federation of Television and Radio Artists ("AFTRA") represents a bargaining unit of announcers, producers, journalists, traffic reporters and meteorologists at the station.

As is typical in the broadcasting industry, WCCO and AFTRA have always bargained a "minimums" collective bargaining agreement. T. 107. They have negotiated only the minimum wages which must be paid to bargaining unit members.

WCCO is expressly permitted under the labor contract to pay more than minimum to anyone in the bargaining unit. Genl. Counsel Ex. 3 at Articles 8 and 22-25. WCCO is also permitted to negotiate individually with employees for terms and conditions of employment which are better than the minimums set forth in the labor agreement. *Id.* at Art. 8.02 (. . . "nothing in the Agreement shall be deemed to prevent any employee from negotiating for or obtaining better terms than the minimum terms provided herein"). WCCO is also permitted under the labor contract to enter into individual contracts with employees for services of a type not covered by the labor agreement. *Id.* The amount or terms of individually negotiated compensation, or of any benefit granted in individual bargaining, is not subject to arbitration under the grievance procedure. *Id.* at Articles 8.02, 22.19, 23.07 and 24.04.1.

WCCO formalizes some of its individually negotiated agreements in complete personal service contracts ("PSC's"), but sometimes such agreements are contained in less formal writings or not reduced to writing at all. T. 193.

AFTRA has never participated in negotiating any employee's individual agreement. T. 139-140. Nor has AFTRA ever participated in negotiating any "overscale" terms or compensation for an individual, whether or not a personal service contract was entered into. *Id.* WCCO has negotiated individual agreements only with the individual employees involved.

During the entire time that AFTRA and WCCO have collectively bargained together, WCCO has never given AFTRA a copy of any individual's personal service contract nor revealed to AFTRA the compensation provided therein or the amount of any individual's overscale compensation. T. 141.

On January 6, 1986, and on March 10, 1986, AFTRA's executive secretary made 15 separate demands for disclosure of information, claiming the information was needed for upcoming bargaining. WCCO complied with many of the requests and they are not at issue.

The requests at issue in this case concern, generally speaking, the amount of "overscale" (or, individually negotiated) fees, copies of all PSC's or other documents memorializing the individually negotiated agreements, and the specific terms of each of the individual agreements.

WCCO made numerous offers of alternative information and/or limited access to the information sought, but it refused to disclose unconditionally the specific overscale fees, the individually negotiated PSC's and agreements, and their specific terms. For example, on January 16, 1986, WCCO offered to disclose the amounts of all the minimums being paid and to make copies of the PSC's available for review by

AFTRA's certified public accountant with the understanding that the actual terms of the PSC's and actual amounts being paid would not be revealed by the CPA, but rather he would confirm whether or not the minimums set forth in the labor contract were being met. Genl. Counsel Ex. 6. WCCO also offered to reveal the aggregate (i.e., group total) wages being paid to journalists (treated as a separate group), specialists (treated as a separate group), announcers (treated as a separate group), and other similar groupings. *Id.* (Such aggregate wage figures had been used by the union in prior negotiations.)

On March 18, 1986, WCCO offered to disclose to AFTRA's *attorney* the actual PSC's and amounts of "overscale" fees, provided the attorney not reveal the individual specific salaries, fees and terms but merely assured compliance with the labor contract. Resp. Ex. 3.

Subsequently, WCCO offered to reveal the ranges of compensation for the nine people on PSC's divided into groups consisting of the three highest paid, the three middle, and the three lowest paid. T. 151. WCCO also offered to provide to AFTRA's executive secretary copies of the individual agreements with the specific amounts of wages redacted, so long as he agreed not to disclose the contents to anyone outside of the WCCO bargaining unit. Resp. Ex. 5.

However, WCCO consistently maintained its position that the actual amounts of overscale compensation and the specific wages and perquisites of the individually negotiated agreements are confidential trade information.

On April 8, 1986, AFTRA issued a report to its members, stating that the personal service contracts were being sought by the union "to negotiate gains . . . by adding to the *base contract*" (i.e., the minimums). It stated further that:

> Only the Executive Secretary [of AFTRA] and union attorneys would ever *see* any individual contract. At no time would your salary be revealed to anyone. . . .
>
> What would the bargaining unit know? The committee would know general salary levels for the average performer. *Actual salaries and high-end ranges would not be disclosed.* The committee would know aggregate totals for Announcers, Producers, SBJs, et al. Finally, the committee would know about those kinds of perks in personal service contracts that would be helpful to general negotiations, without attaching a name to any specific perk.

Resp. Ex. 14, A-43 et seq., *emphasis in original.*

AFTRA filed unfair labor practice charges against WCCO concerning its refusal to unconditionally disclose the information. The Board issued a complaint, and, after hearing, concluded, among other things, that WCCO had violated §§8(a)(1) and (5) of the National Labor Relations Act by refusing unconditionally to disclose to AFTRA the requested information and that the requested information was not entitled to some measure of protection as confidential or trade secret information. The Board furthermore rejected WCCO's argument that its alternative offers of information were reasonable accommodations to protect its competing interests.

The Eighth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's conclusion that the information requested was relevant notwithstanding the union's own report to its members (a) ignores the fundamental and important labor law principle that the union's executive secretary is merely an agent for the union membership with no independent right of his own to information, (b) ignores other fundamental labor law principles and (c) conflicts with precedent holding that a union's public pronouncements may be binding.

The Eighth Circuit recognized that if the information requested by a union has no relevance to any legitimate union collective bargaining need, a refusal to furnish it could not be an unfair labor practice. 844 F.2d at 514. However, the Eighth Circuit concluded that there is "little doubt" that the information requested here is relevant, notwithstanding the fact that the union's own report to its members implicitly conceded the irrelevance of the information. *Id.*

In so ruling, the Eighth Circuit misconstrued the status and responsibilities of the union's executive secretary as elaborated in numerous prior decisions. The Eighth Circuit furthermore ignored the binding effect of a union's public pronouncements.

While information concerning wages of employees in the bargaining unit is presumptively relevant, it is well established that the presumption is rebuttable. *E. I. DuPont de Nemours & Co. v. NLRB*, 744 F.2d 536 (6th Cir. 1984); *Oil, Chemical and Atomic Workers Local Union v. NLRB*, 711 F.2d 348, 359 (D.C. Cir. 1983). If the information sought by a union is material only "to an issue plainly foreclosed by an existing contract" or patently outside any bargaining issue,

it is not relevant and need not be disclosed. *Western Massachusetts Electric Co. v. NLRB,* 589 F.2d 42, 48 (1st Cir. 1978); *NLRB v. Winter Garden Citrus Products Cooperative,* 260 F.2d 913, 917 (5th Cir. 1958).

It is undisputed here that the PSC's and overscale wages are the product purely of individual negotiation between WCCO and employees. The union concedes that it had no intention to bargain individual agreements.[1] Thus, the overscale wages and terms of the PSC's are fundamentally different than the amount of wages paid pursuant to the terms of a labor contract.

The union's April 8th report to its members rebuts any presumption that the information requested here is relevant to any legitimate union purpose. In the report, the union concedes that it had no intention of bargaining about overscale wages or about the individually negotiated personal service contracts. Moreover, the union assures its members that the bargaining unit members would never see the individual PSC's or know the terms thereof. Indeed even the negotiating committee members would only know "general salary levels for the average performer" and "aggregate totals" for the various categories of employee and the "kinds of perks" "that would be helpful to general negotiations, without attaching a name to any specific perk."

In other words, what the unit members would know is exactly what WCCO offered to provide to the union all along (aggregate totals, general salary levels and the kinds of "perks" generally available). If that is adequate for the unit members who must decide whether or not to accept bargaining

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[1] With respect to insuring that minimums were being paid under the PSC's, WCCO offered from the beginning to grant access to the union's CPA or attorney to confirm compliance.

proposals (T.91) and if that is adequate for the committee members who must do the bargaining, then it defies logic to conclude that anything more is necessary to any legitimate union purpose.

The union's executive secretary has no independent right, which would entitle him to demand information which he promises not to reveal to his members. A union acts only as agent for those in the bargaining unit. 29 U.S.C. §159. It is axiomatic that an agent has a duty to communicate to his principal all information that might affect the principal's interests. *Village of Burnsville v. Westwood Co.*, 290 Minn 159, 189 N.W.2d 392 (1971); *Boulevard Plaza Corp. v. Campbell*, 254 Minn. 123, 94 N.W.2d 273 (1959).

In labor relations, a bargaining agent's duty to communicate relevant information is part of the duty of fair representation. A union, for example, breaches its duty of fair representation when it fails to disclose relevant information to bargaining unit members or makes misrepresentations to bargaining unit members. *NLRB v. Local 282, Intern. Broth. of Teamsters*, 740 F.2d 141 (2nd Cir. 1984) (union obligated to communicate terms of arbitration award to all employees affected); *Warehouse Union, Local 860 v. NLRB*, 652 F.2d 1022 (D.C. Cir. 1981) (during negotiations union obligated to inform membership of management's position so membership could make informed assessment); *Anderson v. United Paperworkers International Union*, 641 F.2d 574, 577 (8th Cir. 1981) (duty not to make misrepresentations).

The duty applies to the union's conduct in negotiating a new contract as well as in administering an existing contract. *Acri v. International Association of Machinists & Aerospace Workers*, 781 F.2d 1393, 1397 (9th Cir. 1986) *cert. den.* 107 S.Ct. 73, 93 L.Ed. 2d 29. Hence, a union must honestly and

fully describe bargaining efforts and the parties' positions and it may not deliberately misrepresent or hide either what has gone on at the bargaining table or relevant background facts in order to induce ratification. *Anderson v. United Paperworkers,* 641 F.2d at 577; *Deboles v. Trans World Airlines, Inc.,* 552 F.2d 1005, 1018-20 (3rd Cir. 1977) *cert. den.* 434 U.S. 837 (1977).

The union also breaches its duty of fair representation if it fails to provide its members with information relating to administration of the contract. *Karahalios v. Defense Language Institute Foreign Language Center Presidio of Monterey,* 613 F.Supp. 440, 447 (D.C. Cal. 1984), *rev'd on other grounds* 821 F.2d 1389 (9th Cir. 1987), *pet. cert. filed* 56 U.S.L.W. 3340 (October 7, 1987) (No. 87-636). For example, it is a breach for a union to fail to communicate the terms of an arbitration award to all affected employees. *NLRB v. Local 282, Teamsters,* 740 F.2d 141 (2nd Cir. 1984).

A union is also obligated to divulge to one employee relevant information about another employee on a subject affecting the first employee's interests. So, for example, a union may not refuse to let an employee inspect the union's hiring hall (job referral) records and may not limit its disclosure of hiring hall information just to information about the employee asking to see the records. *NLRB v. Carpenters Local 608,* 811 F.2d 149 (2nd Cir. 1987) *cert. den.* 98 L.Ed.2d 36 (1987); *NLRB v. IBEW, Local 575,* 773 F.2d 746 (6th Cir. 1985). Nor is the union permitted to refuse a request for such information "based on its own determination that the grievance underlying the request is non-meritorious or that the information sought is not essential." *Carpenters Local 608,* 811 F.2d at 152.

Clearly, if a union may not hide relevant facts to induce its members to do what the union has decided is preferable and if a union may not hide facts based on its own determinations

as to merit, then the Eighth Circuit erred in concluding that AFTRA's executive secretary had a right to demand information from WCCO which he would then keep secret from the union's members. 844 F.2d at 515, n.7. AFTRA's report to its members is, in truth and logic, an admission that the information requested from WCCO was not relevant to any legitimate bargaining purpose.

Section 101 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §411, further supports the idea that the union has no right to keep relevant information secret from its members. That section requires the union to provide its members with all relevant information necessary for the members to cast informed votes. *Adkins v. General Motors Corp.*, 573 F.Supp. 1188, 1191 (S.D. Ohio 1983), *aff'd.* 769 F.2d 330 (6th Cir. 1985); *Nienaber v. Ohio Valley Carpenters District Council,* 652 F.2d 1284, 1286 (6th Cir. 1981); *Blanchard v. Johnson,* 532 F.2d 1074, 1079 (6th Cir. 1976), *cert. den.* 429 U.S. 834 and 429 U.S. 869 (1976). It is AFTRA's members here who must vote on any contract proposal; the executive secretary does not vote. T. 91.

The union's April 8th report to members sets forth a position which belies the relevance of its requests for information. A union agent's public statements may not be ignored when they belie the union's requests for information. *See, for example, Silverman v. Major League Baseball Players Relations Committee,* 516 F.Supp. 588, 597 (S.D.N.Y. 1981).

The Eighth Circuit fundamentally misconceived the role of the union in collective bargaining. Its decision permits a union to pacify its members with assurances that their individually negotiated contracts are confidential and would never even be revealed to the negotiating committee, while the union simultaneously claims before the Board that such information is necessary to a legitimate collective bargaining

purpose. Such information cannot be relevant to any collective bargaining purpose if only the union's executive secretary and attorney will see it. The Eighth Circuit's decision should be reviewed by the Supreme Court.

II. The Eighth Circuit's conclusion that the employer did not have any legitimate interests in keeping confidential the information requested which interests outweighed the union's professed need for unconditional disclosure ignores fundamental labor law principles and the confidential and trade secret nature of the information.

The Eighth Circuit recognized that "the need for confidentiality may in some circumstances excuse an employer from providing information needed by a union". 844 F.2d at 515. However, the Eighth Circuit rejected WCCO's legitimate needs for confidentiality.

It is fundamental that, where a union requests *confidential* or *trade secret* information, the employer may properly resist unconditional disclosure without violating its duty to bargain. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *Oil, Chemical & Atomic Workers Local Union v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983). Where the employer has a legitimate and substantial justification for limiting disclosure, the competing interests must be weighed and the type and extent of disclosure required must accommodate all interests. *Detroit Edison*, 440 U.S. at 314-320.

The balancing of competing interests in such cases is of critical importance in the development of labor law generally such that errors by the appellate courts in this area should be corrected.

The Eighth Circuit here ignores the fact that AFTRA has no role with respect to the individually negotiated agree-

ments. It has never negotiated them. It has never reviewed the PSC's. In its April 8th report it disclaims any intent to bargain about them. This is not, then, a simple case where the union is seeking wage information.

Moreover, the Eighth Circuit erred in concluding that the information is not a trade secret or confidential information. The employer here presented uncontroverted evidence proving that the specific terms of individual personal service contracts is highly confidential and advantageous to a competitor. Ronald Handberg, general manager of WCCO Television, testified without contradiction that it would be very advantageous to a broadcast competitor seeking to negotiate for the services of an employee to know the amount of that employee's compensation and the exact terms of the PSC itself. T. 116-119. This was echoed by petitioner's general manager.

In addition, Thomas Kirby, general manager of another Minneapolis television station, testified that he had recently negotiated with a WCCO TV news anchor and, had he known the terms of her PSC, he could have "countered all elements of [the WCCO TV] contract". T. 218. As Kirby explained:

> The value of an anchor is very, very difficult to measure.
>
> * * *
>
> . . . [T]here is a lot of information inside a personal services contract that relates to money that isn't necessarily salary. Many anchors in this market, and in all markets, have clothing allowances. Some anchors even negotiate trips. I don't know of any in this market, but I do know some in the top five markets who have clauses in their contract that on an annual basis they will be sent on a story outside the country to a place that they can negotiate to do a news series, and that has an economic value.

> Time off, we measure in business as having an economic value, and they may negotiate a variety of vacation schedules or compensatory time for days when they have to make public appearances. The list goes on and on. If I can define everything that's within a contract economically for an anchor who I want to hire, whether it's because I want that anchor or it's because I want to move them as a key competitor away from the station across the street from me, if I have all of that economic information, I can project how much a station budgeted for an anchor and I can disrupt that station in one of two ways.
>
> I can either hire or move the anchor, or I can force that anchor's salary to such a level that the station is forced to take the money out of some other area of their budget, impacting on their ability to cover news. Both of those tactics are fairly common among news directors in the top markets.

T. 226-228. That testimony is not controverted.

Clearly, then, the specific terms of the PSC's and overscale compensation have economic value. The Minnesota Uniform Trade Secret Act defines trade secret as any information that:

1. derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
2. is the subject of reasonable efforts to maintain its secrecy.

Minn. Stat. §325C.01, Subd. 5.

The Eighth Circuit concluded, however, that the specific terms of the PSC's are not trade secrets because competitors

might be able to obtain the information by simply asking WCCO employees for it. 844 F.2d at 516. This ignores both the evidence presented and controlling interpretation of the Minnesota statute. All that is required in Minnesota is that a company make "some effort" to signal to its employees that the information at issue is confidential. *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 901 (Minn. 1983).

It is uncontroverted that the station management has negotiated the PSC's "behind closed doors" with all notes and records kept under lock, with strictly limited access, and with mutual expectations of privacy. T. 140-141, 146-147 and 196. WCCO's general manager had an understanding with the employees negotiating with him that the PSC's and individually negotiated terms would be kept confidential. *Id.* Such discussions of confidentiality can be sufficient in Minnesota to constitute reasonable efforts. *Gordon Employment, Inc. v. Jewell*, 356 N.W.2d 738, 741 (Minn. App. 1984). Moreover, the only evidence about "asking an employee" about his PSC was provided by competitor Thomas Kirby who testified that the WCCO TV employee with whom he negotiated did *not* reveal to him the terms of her PSC. T. 215-224.

The Eighth Circuit erred in concluding that, merely because nothing "prohibits disclosure", there can be no trade secret. The law requires only "reasonable" efforts to signal that the information is confidential. The Eighth Circuit should have recognized the protectible nature of the information and balanced that interest against whatever need is suggested by the union's April 8 report to its members.

The Eighth Circuit's total rejection of WCCO's needs for confidentiality and its refusal to balance those needs (for example, by limiting disclosure) is error of the most serious kind.

CONCLUSION

For the reasons stated herein, petitioner prays that its petition for certiorari be granted. Petitioner's interests in keeping confidential the specific terms of its personal services contracts with employees deserves some measure of protection, particularly where the union's expressed need is not for the members' use. Those interests should be balanced against the union's statements about how the information would be used (for the union's executive secretary, but not the union members). In effect, the Eighth Circuit ignored the petitioner's interests and merely accepted the notion that the union is entitled to wage information unconditionally. Petitioner asks this Court to grant this petition and review the Eighth Circuit's decision.

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APPENDIX

282 NLRB No. 159

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 18—CA—9549

WCCO RADIO, INC., A DIVISION OF MIDWEST COMMUNICATIONS, INC.

and

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, TWIN CITIES LOCAL

DECISION AND ORDER

On 15 September 1986 Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.[3]

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[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The Respondent asserts that it has agreed to provide the information in item 13 of the Union's request, except for the information which has no relevance to unit employees. It acknowledges that

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, WCCO Radio, Inc., a Division of Midwest Communications, Inc., Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. 12 February 1987.

DONALD L. DOTSON,
Chairman

WILFORD W. JOHANSEN,
Member

MARSHALL B. BABSON,
Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

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certain information requested in item 13 is applicable to unit members and further acknowledges that it has not provided any information requested in item 13. Accordingly, we find that the Respondent thereby violated Sec. 8(a)(5) of the Act. We shall leave to the compliance stage of this proceeding the determination of the precise information in item 13 which the Respondent must furnish the Union.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
Case No. 18—CA—9549

WCCO RADIO, INC., A DIVISION OF
MIDWEST COMMUNICATIONS, INC.,
Respondent,

and

AMERICAN FEDERATION OF TELEVISION
AND RADIO ARTISTS, TWIN CITIES LOCAL,
Charging Party.

Larry L. Witherell, Esq., of Minneapolis MN, for the General Counsel.

Carol A. Ellingson, Esq. (*Oppenheimer, Wolff, Foster, Shepard and Donnelly*), of St. Paul MN, for the Respondent.

Connie L. Howard, Esq. (*Gordon, Miller, & O'Brien*), of Minneapolis, MN, for the Charging Party.

DECISION

Statement fo the Case

MICHAEL O. MILLER, Administrative Law Judge: This case was heard in Minneapolis, Minnesota on 28 and 29 April 1986 based upon an unfair labor practice charge filed on 5 February 1986 by American Federation of Television and Radio Artists, Twin Cities Local (herein called the Union) and a complaint and amended complaint issued on 19 March and 11 April 1986, respectively, by the Regional Director of Region 18 of the National Labor Relations Board (herein called the Board). The complaint, as amended, alleges that WCCO Radio, Inc., a Division of Midwest Communications,

Inc. (herein called the Respondent or the Employer), violated Section 8(a) (5) and (1) of the National Labor Relations Act (herein called the Act) by failing and refusing to furnish the Union with information necessary and relevant to the performance of its duties as collective-bargaining representative. Respondent's timely filed answer denies the commission of any unfair labor practices.

All parties were afforded full opportunity to appear, to examine and to cross-examine witnesses, and to argue orally. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Respondent.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Respondent's Business and the Union's Labor Organization Status—Preliminary Conclusions of Law

Respondent is a Minnesota corporation with its office and place of business in Minneapolis, Minnesota where it is engaged in the operation of a radio broadcasting station. The complaint alleges, and Respondent admits, that Respondent purchased and received goods and services from points directly outside the State of Minnesota valued in excess of $50,000 during 1985. I find and conclude that Respondent is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practices

A. *The Facts*

1. Background—The Collective Bargaining Relationship

The Union has represented Respondent's employees, and these parties have negotiated a series of collective-bargaining agreements, since at least 1951. The most recent 3-year agreement expired on 31 March 1986. The employees whom it covered comprise the following unit which the parties have stipulated to be appropriate for the purpose of collective bargaining:

> All full-time and regular part-time Announcers (including Staff Announcers, Staff Specialists, Associate and Free Lance Announcers), Producers (including Staff and Free Lance Producers), Staff Broadcast Journalists, Staff Traffic Reporters, and Staff Broadcast Meteorologists, excluding all other employees, guards and supervisors as defined in the Act.

The collective-bargaining agreements have provided, among other things, for a complex wage structure based, at least in part, upon a fee system. The contractually agreed-to fees are set forth in appendices to the collective-bargaining agreement. The fees, wages, and other terms and conditions of employment set forth in the agreement are expressly considered as minimums. The agreement permits employees to contract with the employer for wages and benefits superior to those negotiated by the Union. Nine of the 35 employees in the collective-bargaining unit have personal service contracts (PSC's) with the employer providing for wages or benefits greater than the Union's negotiated minimum terms and conditions.

In 1983, at the outset of negotiations for the recently expired agreement, the Union asked Respondent for copies of the personal service contracts. Respondent refused and the

Union filed an unfair labor practice charge. That charge was withdrawn upon Respondent's furnishing of aggregate compensation information, i.e., information concerning the wages and fees earned by each of the various groups of employees, such as the four staff announcers. Also furnished to settle that charge was "some of the language which is found in one or more of [the] personal service contracts," particularly language dealing with termination, covenants not to compete, and the term and termination of the personal service contracts. Respondent's executive secretary, John Kailin, upon receiving that information, repeated the assurances he had made to Respondent at the bargaining table that he intended "to use these [the aggregate compensation] figures solely for the purposes of collective bargaining in representing the membership of AFTRA" and would "not disclose these figures to any third party."[1]

2. 1986 Negotiations—Information Demands

On 6 January 1986,[2] the Union opened negotiations for new agreement by letter to Respondent's general manager, Clayton Kaufman. In that letter, the Union requested information in ten areas. Respondent complied with six of the Union's requests and they are not at issue here.[3] Additionally, the Union requested the following information:

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[1] The Union represents bargaining units at nine AM and FM radio and TV stations. It is only at WCCO TV, WCCO AM and WCCO FM (now called W-LITE) that some employees have personal service contracts. The Union has requested the personal service contracts at WCCO TV in the last one or two periods of contract negotiation but has never received them. The most the Union has been given is the right to have its certified public accountant examine the PSC's for compliance with the collective-bargaining agreement.

[2] All dates hereinafter are in 1986, unless otherwise specified.

[3] The Union requested, and the employer provided, information concerning the identity, classification, hours, programs performed by and base salaries of, certain employees.

7. The retainer fees paid all Associate Announcers.

8. The list of all programs and the fee that attaches to that program for all Announcers in all categories.

9. A list of the salary, shifts, programs and fees attaching to each program for every Producer, Staff Broadcast specialist and Staff Broadcast Meteorologist.

10. A copy of personal contracts.

The Union explained in the letter that it deemed each of the items requested to be "vitally necessary for AFTRA in order to properly represent its members in negotiations, because only the above information will provide us with a complete list of all the terms and conditions of the bargaining unit members." In his testimony, Union Executive Secretary Kailin explained further that, with respect to the entire bargaining unit, the Union wanted to know as much as the Company does about how much people were actually being paid so that it could decide whether to seek new standards. It also sought the information in order to determine whether or not the amounts each individual was receiving equaled the minimum fees set forth in the contract.

Specifically, the Union considers the retainer fees paid the associate announcer, item 7, to be part of the basic salary information. Kailin wanted to be able to compare the fees this individual would be entitled to for the programs he performed with the lump sum for which he and the employer had contracted.

Item 8, the list of all programs and the fees paid for them to all announcers, was sought by the Union so that it would know the actual fees, which might differ from the collectively bargained fees by virtue of either individual negotiations or past practices. The Union had learned through an earlier grievance that the fees being paid were not necessarily the same as those in the contractual fee schedules. Item 9, the

salaries, shifts, programs, and fees attaching to each program for producers, staff broadcast specialists and staff broadcast meteorologists, was sought for the same reason.

The Union sought copies of the personal service contracts (item 10) because they contained information as to both overscale wage arrangements and perquisites. Included among those "perks," the Union believed, were compensation for covenants not to compete, wardrobe allowances, deferred compensation, supplemental pension and welfare compensation and, possibly, language concerning discipline, discharge and termination pay. In response to questions concerning how the Union could use this information if it were furnished, Kailin explained that knowledge concerning what the employer was paying to specific talent could provide the basis for Union demands to raise the minimum salaries and fees set forth in the collective-bargaining agreement, thus helping the Union set its overall bargaining strategy. With respect to the perquisites, Kailin testified that examination of the PSC's might reveal language in such areas as discipline and discharge which failed to conform to the standards of the basic Union contract or noncompetitive covenants which were overly restrictive under State law. This might impel the Union to bargain for different standard language as the minimum conditions to be set forth in the collective-bargaining agreement.

On 16 January, Kaufman refused the Union's request for items 7 through 10. With respect to the retainer fee paid associate announcers (of whom there was only one), Kaufman wrote that the contract permitted individual negotiation between associate announcers and the station so long as the retainer fee paid equaled or exceeded the contractual minimum. He offered to confirm that a retainer fee was being paid and suggested that the Union determine the amount of

that retainer fee from the associate announcer, contending that "it appears to have no bearing on collective bargaining." With respect to the remaining requests, Respondent offered to provide the Union with a list of a contractual minimum fees and salaries which they were paying and a list of the shifts and programs for the various categories of unit employees. Specifically with regard to the personal service contracts, Kaufman wrote:

> With respect to anyone on a personal service contract or being compensated in excess of the minimums required by the collective bargaining agreement, we will make available to AFTRA's certified public accountant during the normal business hours and after reasonable notice, copies of personal service contracts and records relating to the compensation being paid: provided that the certified public accountant agrees in writing that he will not divulge the actual amounts paid but will only confirm whether or not the amounts paid equal or exceed the minimums.

It was Respondent's stated position that the PSC's and over-scale compensation rates were not subjects of collective bargaining, that the Union had "waived its right to bargain over those subjects and hence has no legitimate need for the amounts thereof." Kaufman noted that the CPA procedure was utilized by the Union at Respondent's sister television station. In the alternative, Kaufman offered to provide the Union with the base and aggregate talent fees being paid to each group of unit employees, as it had done in the preceding negotiations.

Kailin and Kaufman continued to discuss their respective positions in a telephone conversation about 10 February. Kaufman, it appears, offered to inform the Union whether Respondent was paying scale or above scale with respect to

any particular program but without disclosing the amount being paid. He reiterated the company's offer to provide some or all of the information in the PSC's to the Union's CPA provided that CPA agree not to divulge anything in those PSC's to Kailin and to examine them solely for the purpose of confirming adherence to the collective-bargaining agreement. Kailin protested that the company's offer would be of no value to the Union inasmuch as the Union's CPA was not familiar with collective-bargaining agreements, could not interpret such contracts, and did not know what the fee minimums were. Moreover, Kailin stated, inasmuch as the company's offer would preclude the CPA from sharing either the salary information or the "perks" with the Union, the Union would not be able to use the information as the basis for formulating new bargaining proposals. Kaufman explained to Kailin that the company's position was based upon its view of the personal service contracts as being confidential matters between the employer and the employees. Kailin endeavored to assure him that the Union, with its long experience in representing talent, was aware of the employees' desires, in general, to prevent the world at large from knowing how much they were being paid. The Union, Kailin said, had always held those salaries to be confidential and had given Respondent no basis to distrust it on that point. He asserted that the Union had a statutory right to the information so that it could address the company "at the bargaining table as equals, and so that [it could] administer [the] contract and know that the minimums were not being evaded." Kailin was unsuccessful in his attempts to convince Kaufman to release the requested information.

At some point in their exchanges, Kaufman offered to provide the above-described information to the Union's attorney rather than its CPA, but on the same terms as it had been

offered to the Union's CPA. His offer did not satisfy Kailin inasmuch as it still limited the Union to information with respect to contract compliance and preclude the Union from having this information to prepare and support new collective-bargaining demands.

On 3 March, Kaufman wrote the Union, repeating earlier suggestions. Specifically, he again offered to provide the PSC's to the Union's CPA with the previously stated limitations or to provide "the aggregate group total data plus language from our basic personal services contracts dealing with such things as termination, discharge, covenant not to compete, outside employment, etc." With respect to the fees being paid, Kaufman reiterated the 10 February offer to provide the following information about programs on which fees were and were not being paid:

> Programs and features for which scale fees are paid;
> Programs and features for which overscale fees are paid;
> Programs and features for which a fee is paid although it is not required by the basic agreement; and
> Programs and features for which fees are not paid.

Kailin and Kaufman met for collective bargaining on 10 March. In the course of this meeting, Kaufman suggested that the fee system was obsolete; Respondent was considering its elimination, he said, and was thinking of negotiating a base salary.[4] Kailin replied that the Union could not address a new fee system without knowing what the employees were earning, that indeed it could not negotiate a complete new contract without the information which it had requested because Respondent and the Union were not bargaining as equals when they did not have equal access to relevant information. He

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[4] Kailin's credibly offered testimony indicates that Respondent had, even earlier, alluded to a desire to eliminate the fee system.

stated that the Union was not waiving any rights by bargaining. The parties agreed to negotiate an interim contract pending the outcome of this litigation.

During the 10 March meeting, the Union presented Kaufman with a letter setting forth additional information requests which it sought "in order . . . to prepare for current contract negotiations". Requested were the following, numbered seriatum from the Union's earlier request:

> 11. The accounting or payroll records which contain or set forth the actual compensation received by each member of the AFTRA bargaining unit during the period April 1, 1984-March 31, 1985 and April 1, 1985-February 28, 1980.
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> 12. The accounting records which contain or set forth compensation, trade offs or other value received by WCCO Radio in connection with any type of broadcasts, simulcasts, rebroadcasts or other live or recorded use or reuse of written, audio or video material prepared or performed by bargaining unit members . . .
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> 13. The current Company personnel manual provisions dealing with or setting forth the following benefits, programs or conditions of employment: pension, medical insurance; dental insurance; long term disability; employee stock ownership; holidays; vacation; sick leave; per diem expenses; funeral leave; jury duty; parental leave; employee indemnification or other benefits offered to non-bargaining unit personnel.
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> 14. Any and all written documents, manuals or memoranda setting forth or containing WCCO procedures, policies or guidelines with respect to discipline or discharge of employees in the bargaining unit represented by AFTRA.

> 15. Copies of all payroll or personnel or accounting records which set forth the number of hours (regular and overtime) worked by each employee in the bargaining unit represented by AFTRA from April 1, 1983 or the date of the Employee's current personal service contract, whichever is earlier.

Kailin explained, in the letter setting forth the above requests, what the Union intended to accomplish in these negotiations, as follows:

> In these negotiations it is our intent to discuss the interplay between the personal service contracts and the Basic Minimum Agreement. In this connection, we are concerned not only with areas in which there may be conflicts between personal contracts and the Basic Minimum Agreement, but also with areas or methods by which the Basic Minimum Agreement and personal service contracts may coexist and satisfy the concerns of both WCCO Television [sic] and our membership.

Kailin gave the foregoing requests to Kaufman in writing and orally explained what it was that the Union was seeking. With respect to item 11, he explained that the Union wanted to know the salaries during time periods which conformed to the collective-bargaining agreement, noting that the personal service contracts sometimes run for different periods. Item 12, Kailin explained, related principally to the meteorologists but could impact more broadly. The Union sought to know whether Respondent received additional fees from other stations for broadcasts prepared by the meteorologists and whether the meteorologists performed additional work. If either was the case, the Union's bargaining position might change and higher fees for other types of work might be sought. By requesting item 13, the company personnel

manuals with respect to benefits, the Union sought to determine whether the Respondent had improved such benefits for nonunit employees as a basis for formulating bargaining demands on such matters. The Union sought item 14, documents or statements with respect to discipline and discharge, to determine whether there was any conflict between the company's procedures and the collective-bargaining agreement. By requesting item 15, the Union sought overtime information to determine what portion of the employees' earnings were attributable to overtime with an eye toward possible grievances or negotiations with respect to base wage.

In this meeting, and in each subsequent collective-bargaining meeting, the Union also repeated its request for items 7 through 10. Respondent has declined to furnish those items, although, as will be discussed herein, some alternate information has been offered.

In response to the Union's requests for information, Respondent asserted its position that the information was confidential, that it feared that broadening the circle of those with access to the information would result in its disclosure. Kailin again assured Respondent that the Union was committed to maintaining the confidentiality of its members' earnings. Some of those members, Kailin stated, were desirous of keeping their earnings secret and as Kailin's job was subject to his membership's approval, he could not alienate them by breaching that confidence. He explained to Kaufman how his office would function to maintain the desired confidentiality.

On 18 March, Kaufman wrote Kailin, reiterating a telephonic settlement offer which had been made on or about 14 March.[5] With respect to the Union's request number 7, the

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[5] This offer of settlement was received in evidence without objection.

Employer agreed to disclose the retainer fees paid to the associate announcer. With respect to items 8 and 9, Respondent offered to provide the programs to which fees for announcers and producers attach and the amounts of the fees for all persons not under personal service contracts. It offered to provide the Union's attorney with the fees being paid pursuant to PSC's, to review for contract compliance purposes on the condition that the attorney promise not the reveal dollar amounts to anyone. Similarly, Respondent offered to provide the Union's attorney with copies of all current PSC's and similar agreements "provided your Attorney promises in writing he will not reveal dollar amounts or any other terms contained therein to anyone, and represents in writing that his sole purpose is to assure that the agreements noted above comply with the terms of our basic agreement."

With respect to Union request number 11, the compensation earned by each employee during the last two contract years, the company offered to provide that information for all employees. However, the compensation earned by employees pursuant to PSC's and similar agreements would be provided only to the Union's attorney under the conditions described above with respect to request number 10. The company denied that there was much which was applicable to the Union's request number 12, seeking information concerning compensation it received from other broadcasting outlets for the broadcasts prepared by its meteorologists, but offered to make available whatever information "is pertinent." Respondent offered to provide copies of its manual provisions describing benefits offered to nonunit personnel (item 13) and denied that it had any documents, manuals, or memoranda respecting discipline and discharge (item 14) other than what was set forth in the collective-bargaining agreement. Finally, with respect to its

records of hours worked by each employee, item 15, Respondent offered to provide that information for all employees. However, information concerning the hours worked by employees under PSC's would only be disclosed to the Union's attorney under conditions identical to those set forth above in item number 10.

The company did not, at that time, provide the information which it indicated it was willing to provide. The employer's offer did not satisfy the Union or induce it to withdraw the unfair labor practice charge. On 27 March, the parties reached an interim collective-bargaining agreement, subject to reopening upon resolution of the information issues.

On 23 April, Union counsel made another offer to settle this unfair labor practice charge by letter to Union counsel.[6] That letter reiterated Respondent's offer to tell the Union the amount of the retainer fee paid to the associate announcer (item 7) and advised the Union that it received nothing of value for simulcasts and similar programs (item 12). Further, it stated that no records were maintained of hours worked by anyone on personal service contracts but assured the Union that no one under such a contract was working on the air for more than 40 hours per week (item 15). Respondent assured the Union that it would provide "any policy statements or guidelines applicable to unit members," a partial response to item 13. This appears to be less than what was offered on 18 March with respect to item 13. It does not meet the Union's request for such information as was applicable to nonunit employees.

With respect to the Union's demands for information concerning the program fees, Respondent offered to provide a

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[6] This offer of settlement was received in evidence without objection.

copy of the program logs for a representative one-week period, a list of every program for which a program fee was paid and the specific amount of that fee even where the fee was greater than that required by the collective-bargaining agreement. However, with respect to employees paid a "per performance wage pursuant to a personal service contract," Respondent asserted that the Union could determine the monthly earnings of such employees from the monthly pension and welfare reports. If that information was insufficient, Respondent offered again to provide the specific information to the Union's CPA upon the CPA's assurances of confidentiality "but only to confirm to AFTRA whether or not the individual is earning in excess of AFTRA's calculation."

Finally, the Respondent offered to provide the Union with copies of each personal service contract or other written agreement with the specific amounts of compensation deleted (except for compensation received for covenants not to compete). In return for that, Respondent insisted that the Union hold those agreements "in strictest confidence" making the information available only to the Union's executive secretary.

Respondent asserted that the Union did not need to be told the specific earnings of employees under personal service contracts because it could determine those amounts from the pension and welfare reports submitted monthly by the company. Those reports show the employer's contribution to the pension and welfare funds; that contribution is a fixed percentage of the employees' gross earnings up to a specific annual earnings limit. The pension and welfare fund reports do not show contributions after an employee has reached that limit. Respondent stated:

> AFTRA can therefore on a monthly basis calculate the amount of each employees' gross earnings and, by extrapolation, calculate that employee's yearly earnings. When

> an employee earns less than the P & W cap the precise amount of gross earnings is obtained by simple multiplication. When an employee earns more than the P & W cap amount, each monthly contribution is still based on his gross monthly earnings and contributions for the year simply stop in the month when the cap is reached. Again, a simple mathematical calculation will reveal the individual's rate of pay and the gross salary for the year. Thus, for everyone in the unit, AFTRA is presently able to calculate the gross earnings within a very close tolerance.

Respondent offered to furnish the Union with copies of the monthly P & W fund report at the same time that they were furnished to the Union's International office in Chicago.

Respondent's letter concluded:

> Just so it is clear, the Company is absolutely committed to the principal of confidentiality of the monetary terms set out in the personal service contracts. AFTRA members/employees expect such confidentiality and, in some cases, have bargained expressly on that basis. The Company will go to the wall to uphold that principal and to maintain its good faith with those who have entered into contracts.

The Union argues that Respondent's most recent offers were inadequate. Recourse to the offered program logs would reveal only a list of programs without the dollar amounts attached thereto. Further, even with the dollar amounts being given, a log for a single week would not help the Union gauge the compensation for a whole year. Recourse to the pension and welfare reports, Kailin testified, would not be adequate because the reports do not show earnings above the annual cap, the periods shown do not correspond to either the collective-bargaining contract year or the personal service contract

year, and because there are apparent discrepancies between the figures shown on the pension and welfare reports and the members' own reports of their annual earnings.

B. *Analysis and Conclusions*

The Union seeks, and the General Counsel contends that the Union is statutorily entitled, to know the specific details of the compensation of all unit members, including those paid pursuant to personal service contracts. Respondent argues that the information sought by the Union is neither relevant nor necessary inasmuch as the Union has waived its right to bargain for overscale compensation. It argues further that the information sought is in the nature of a trade secret, disclosure of which will irreparably damage Respondent, that the employees involved desire confidentiality, and that some of the information is available or has been offered to the Union in other forms. A long line of Board and court decisions support the General Counsel's contentions.

In *Teleprompter Corp. v. NLRB*, 570 F.2d 4 at 8 (1st Cir. 1977) the First Circuit Court of Appeals observed:

> The "general obligation" described in *Acme* [*NLRB v. Industrial*, 385 U.S. 432 (1967)] extends in varying degrees of intensity throughout the many aspects of management-union relations, with accommodation being made between the union's urgent need for some types of information, such as wage data, and the employer's greater relative interest preserving the confidentiality of other information, such as profitability data.

Reiterating that same language in *Western Massachusetts Electric Co. v. NLRB*, 573 F.2d 101 (1st Cir. 1978), enforcing 228 NLRB 607 (1977), the court went on to state:

> Information pertaining immediately to the mandatory subjects of bargaining-wages, hours, and other terms and conditions of employment . . . is presumptively

relevant and must be disclosed unless it "plainly appears irrelevant." *NLRB v. Yawman and Erbe Mfg. Co.*, 187 F.2d 947, 949 (2nd Cir. 1951).

The burden of establishing that presumptively relevant wage and benefit information is not relevant falls upon the employer. *NLRB v. Borden, Inc.*, 600 F.2d 313, 317 (1st Cir. 1979), enforcing in pertinent part, 235 NLRB 982 (1978); *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977). In both of the cited cases, the courts stated:

> Where the requested information is intrinsic to the core of the employer-employee relationship, and the employer refuses to provide requested information, the employer has the burden to prove either lack of relevance or to provide adequate reasons why he cannot, in good faith, supply the information.

As the facts herein demonstrate, Respondent has failed to sustain that burden of proof.

Respondent cites a subsequent *Western Massachusetts Electric* case, *Western Massachusetts Electric Co. v. NLRB*, 589 F.2d 42 (1st Cir. 1978) for the proposition that information material only to an issue plainly foreclosed by an existing contract or patently outside any bargaining issue is not relevant and need not be disclosed. That case, however, supports General Counsel's contentions. There, the union which had never participated in the employer's routing decisions, sought the guidelines used by the company in altering the routes of meter readers. The court enforced the Board's order (found at 234 NLRB 1181 (1978)) and ordered the Respondent to provide the information it sought. The court found the information relevant to charting and assessing "apparent midterm courses of action possibly open to the Union . . ." (p. 48). Moreover, it specifically noted that information, such as wages, which relate "to a mandatory subject of bargaining

must usually be made available when sought by the bargaining representative for a proper purpose" quoting *Teleprompter Corp. v. NLRB, supra,* at 8. In the instant case, the Union sought presumptively relevant wage and benefit data for two proper purposes, the preparation of bargaining demands and the administration of its existing contract. With respect to the former, the Union explained that it needed the information in order to determine whether to bargain for higher minimums or greater benefits and protections in the collective-bargaining agreement applicable to all unit employees. As to the latter purpose, the Union sought to assure itself that the earnings of the employees pursuant to personal service contracts at least met the minimum standards of the collective-bargaining agreement and that the benefits and restrictions set forth in those personal service contracts did not contravene either the collective-bargaining agreement or the provisions of State law.

The precise defenses, including that of relevance, raised here by Respondent have been raised by other employers and have been consistently rejected by the Board and the courts in strikingly similar cases over the last three decades. In *Boston Herald-Traveler Corp.,* 102 NLRB 627 (1954), enforced 210 F.2d 134 (1st Cir. 1953) and *Boston Herald-Traveler Corporation,* 110 NLRB 2097 (1954), enforced 223 F.2d 58 (1st Cir. 1955), the union sought the names and earnings of each unit employee, including those who were paid over the collective-bargaining agreement's minimum scale. The employer refused to link the names with the employees' earnings, arguing as Respondent did here, that this information was irrelevant to the negotiations, that the information might aid competitors in hiring away Respondent's employees, and that some employees might object or be offended by disclosure of their earnings to the union. The

Board and the court rejected the employer's contentions; the Board stated, at 110 NLRB 2097, 2098, that its rule requires an employer "to furnish the union representing its employees with a name and earnings of each employee in the appropriate unit in order to make collective-bargaining effective." The union, it stated, did not need to show the precise relevancy of the requested information to particular bargaining issues:

> It is enough . . . that the information relate to the wages or fringe benefits of the employees. Such information is obviously related the bargaining process and the Union is therefore entitled to ask and receive it. The Board's rule recognizes that 'it is virtually impossible to tell in advance whether the requested data will be relevant except in those infrequent instances in which the inquiry is patently outside the bargaining issues.'

In that case, the Board pointed out, in terms similar to the Union's contentions here, that the information would be of use to the union in preparing its bargaining proposals even though the collective-bargaining agreement provided only for minimum scales and noted that the union could not bargain "with maximum effectiveness if it remains ignorant of the salaries of other employees possessing comparable skills and experience." In both the first and second *Herald-Traveler* cases, the Board rejected employer contentions with respect both to the potential embarassment of its employees should their wages be disclosed and the possibility that competing newspapers might entice away their key columnists and reporters.

In *KCMO Broadcasting*, 145 NLRB 550 (1963), the Board specifically treated the issue of whether the Union was entitled to copies of unit employees' personal service contracts complete with their names and the specifics of their salaries.

There, as here, the employer had contended that the information was not related to the issues involved in collective bargaining and therefore need not be disclosed. The employer also contended, as here, that the information was confidential and that disclosure would give rise to jealousy among the unit members. The Board rejected the employer's defenses and stated that the union was entitled to bargain for all members of the unit. The information which it sought, the Board noted, would enable the union to determine whether it wished to bargain with respect to such terms and disclosure of the names would aid the union in evaluating the information. The Board held that the employer's jealousy argument was speculative and conjectural and did not present a factor which should override the union's need for information in order to act intelligently as the bargaining representative of the employees.

Similarly, in *Radio Station WLOL*, 181 NLRB 560 (1970), the employer and the union negotiated a minimum term contract and the station negotiated with certain artists for wage terms in excess of those minimums. The union requested the precise salaries of the employees in the unit in order to bargain intelligently, prepare new proposals, and police the agreement. The employer refused to provide the requested information, arguing relevence, confidentiality (including the possibility of embarassment and morale problems among the employees), waiver, availability of the information to the union from its members, the alleged absence of good faith by the union in requesting the information, and an industry practice whereby such information was generally not furnished to the union. The Board rejected all of the employer's defenses. It noted that wages are a mandatory subject of bargaining and wage information is presumptively relevant, the obligation to furnish

such information is statutory, the interests of the employees who might be offended by disclosure must yield to the interests of the majority of unit employees, and the irrelevance of both the possibility that the union could secure the information from the employees and industry practice.[7]

Most recently, the Board dealt with this issue in *Evening News Association*, 270 NLRB 380 (1984). In that case, as here, the contract provided for minimum terms and permitted the employer and employees to negotiate above scale wages. The union requested wage data on all employees which the employer refused to furnish. In its defense, the employer adduced evidence that one employee had, for personal reasons, asked it not to reveal his earnings. It additionally adduced evidence that knowledge of the employee's earnings would facilitate its competitors in hiring them away. The Board found the employer's refusal to furnish the requested information to be a violation of its duty to bargain in good faith, noting the presumptive and actual relevance of the information. With respect to the employer's arguments concerning competitive advantage, the Board noted that the employer could have negotiated restrictive covenants with the employees, prohibiting them from accepting employment with its competitors. And, with respect to the employee's request for confidentiality, the Board quoted language from *NLRB v. Jaggars-Chiles-Stovall*, 639 F.2d 1344, 1347 (5th Cir. 1981), enfg. 249 NLRB 697 (1980), and *Vaca v. Sipes*, 386 U.S. 171 (1967), which stated that "the collective-bargaining system as encouraged by

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[7] Here, Respondent has failed to establish that there is an industry practice whereby information of the sort sought by the union is never disclosed to the collective-bargaining representative. The Union has offered credible testimony that stations in a number of cities furnish their employees' representatives with copies of the employees' personal service contracts complete in every detail.

Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in the bargaining unit."

On brief, Respondent sought to distinguish *Evening News* from the instant case on the grounds that (1) that employer had previously furnished such information to the union and was withholding it at this time only at the request of one employee; (2) this Respondent has proven prior Union indiscretions with respect to confidential information; and (3) it has similarly proven that the information requested is of a "trade secret" nature. These alleged distinctions are either irrelevant or without factual support. If, as I find, the Union is entitled to this wage data, it matters not whether the information has previously been given and is now being withheld or has always been withheld. Moreover, there is no record evidence to support Respondent's contention that the Union has previously been indiscrete in the disclosure of confidential information. Threatening to "go public" and going public with information concerning an ongoing dispute between management and labor over the alleged unilateral reduction in fees, seriously curtailing the earnings of certain employees, as the Union earlier did, may have resulted in embarassment to the employer but it was an entirely legitimate exercise of statutory rights. In no way can this be called an indiscretion. Similarly, while Respondent may have suspected that Kailin disclosed the details of personal service contract negotiations between WCCO-TV and one of its employees, Kailin credibly denied having done so and there was no probative evidence to contradict him.

Finally, in this regard, I must reject Respondent's contention that the financial aspects of the personal service contracts are in the nature of a "trade secret" entitled to some special measure of protection by the invocation of that term.

Even under Minnesota law as cited by Respondent (Minn. Stat., Sec. 325 C1.01, Subd. 5), this information cannot be deemed a "trade secret." That statute defines a "trade secret" as something which may not be "readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use and . . . the subject of reasonable efforts to maintain its secrecy." Here, competitors may obtain this information merely by asking the employees whom they are soliciting to hire away. Those employees are under no proscription which would prohibit them from disclosing that information if they so desired. Logic precludes one from labelling as a "trade secret" any information which may be so freely disclosed at the whim of any employee possessing it.

Throughout these negotiations, the Union has recognized that the employer, for business reasons, and some of the employees, for personal reasons, would prefer that the details of the personal service contracts not become common knowledge. Kailin has repeatedly assured Respondent that it understood and appreciated these desires and would accommodate them by appropriate security measures within the Union. There is no reason to doubt the sincerity of the Union's promise to be circumspect in handling this information or to doubt its ability to do so. As the Board stated in *Cowles Communications, Inc.*, 172 NLRB 1909, 1910 (1968), "we foresee no less responsible handling of sensitive data by union officials than by Respondent." See also, *Globe-Union, Inc.*, 233 NLRB 1458 (1977).

Respondent also argues that material the Union has available to it or which it has offered to furnish the Union would satisfy the Union's need for this information. Specifically, Respondent contends that its obligations have been satisfied by the availability of the pension and welfare reports, its

offers to furnish a representative sampling of program logs and its offers to give copies of the PSC's to the Union's CPA or attorney. The Union correctly points out that the pension and welfare records are incomplete and not necessarily accurate, that use of the program logs would be a cumbersome way, at best, of determining what the employees should be earning and would not be for an entire year, and that Respondent's offer to furnish the PSC's to its CPA or attorney would limit the use of those PSC's to contract administration and would preclude it from using the information contained therein to formulate new bargaining proposals. The Union's objections are well taken and comport with long standing Board and court precedent. A union is not required to be satisfied with partial information or to go through cumbersome procedures in order to collect the necessary information where that information is available in a more convenient and accurate form directly from the employer. See, for example, *Washington Hospital Center*, 270 NLRB 396 (1984); *The Kroger Company*, 226 NLRB 512 (1976); *NLRB v. Borden, Inc.*, 600 F.2d 313 (1st Cir. 1979), enforcing in pertinent part 235 NLRB 982 (1978).

Contrary to Respondent's contentions, the Union's action in filing and pressing its unfair labor practice claim was not so premature as to raise questions about its good faith in these negotiations. This information issue has been raised in several prior negotiations between these parties over the last 6 years as well as in the instant negotiations. The Union has tried in the past to make do with less information than it sought and has apparently found compliance with Respondent's limitations to be unsatisfactory. To file this unfair labor practice charge prior to the actual opening of negotiations, in the hope that it would precipitate the complete dis-

closure to which the Union was statutorily entitled before the parties sat down at the bargaining table, can hardly be deemed premature. Moreover, Respondent's own claim of a good faith concern for confidentiality must be subject to close scrutiny. *Washington Hospital Center, supra*; *Johns Manville Sales Corp.*, 252 NLRB 368 (1980). If, as the employer claims, the Union could determine the employees' actual earnings from the pension and welfare reports, then the employer's confidentiality-based justification for refusing to give the Union that same information in the more concise and precise format which it possessed must fall.

Finally, Respondent argues from *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), that the Union's need for the information must be balanced against legitimate employer concerns for confidentiality and that, since *Detroit Edison*, Board cases suggesting that the Union is always entitled to know the earnings of unit employees are of questionable validity. I am, of course, obligated to follow Board precedent and the Board has not seen fit to change its approach to these cases since *Detroit Edison*. See, for example, *Evening News, supra*, a 1984 case. Moreover, *Detroit Edison* presents an entirely distinguishable set of facts. In that case, the union sought information concerning employee aptitude tests, including the actual test questions, employee answer sheets, and the scores on those tests linked with the employees' names. The tests had been administered with promises of confidentiality and the actual test scores were not even disclosed to the management representatives. Disclosure of the test materials, the court noted, would harm the future validity of the tests in which the company had a considerable investment and the court recognized the public policy supporting confidentiality of those tests. The court also noted the sensitivity of the individuals involved to publication of the test results and the

relative ease by which the union could secure the employees' consent to release of that information; the union was, in that case, pressing grievances for those very employees. Moreover, the information sought by the union in *Detroit Edison* was not for contract negotiations covering the unit as a whole and was, as the Board noted in *Jaggars-Chiles-Stovall*, 249 NLRB 697, 701 (1980), another post *Detroit Edison* case, far more sensitive than wage data.

In sum, I find that Respondent has failed and refused to bargain in good faith with the Union by failing to timely furnish the Union with the information requested in items 7, 8, 9, 10, 11, 13, and 15 of its 6 January and 10 March information requests.[8]

Conclusions of Law

1. By failing and refusing to timely furnish to the Union with the records and information it requested, which are relevant and necessary to the performance of the Union's duties as statutory bargaining representatives of Respondent's employees in an appropriate collective-bargaining unit, Respondent has violated Section 8(a) (5) and (1) of the Act.

2. The unfair labor practice set forth in paragraph 1 above affects commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent violated Section 8(a) (5) and (1) as set forth above, I recommend that it be required to cease and desist from such conduct or related conduct. Affirm-

[8] The Union was given information concerning the retainer fee (item 7) paid to the one associate announcer, but not until the day of hearing. Respondent had agreed to furnish only some of the information requested in item 13. Items 12, 14, and 15 (as it applies to employees under PSC's) apparently do not exist and the Union has been so informed.

atively, in order to effectuate the policies of the Act, I recommend that Respondent be required to furnish the Union with the information it requested in items 8, 9, 10, 11, 13, and 15 of its 6 January 1986 and 10 March 1986 letters to Respondent. I also recommend that Respondent be required to post an appropriate notice to employees.

Upon the foregoing findings of fact and conclusions of law and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[9]

ORDER

Respondent, WCCO Radio, Inc. a Division of Midwest Communications, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to timely furnish American Federation of Television and Radio Artists, Twin Cities Local, with requested information which is relevant and necessary to the performance by said Union of its obligations as bargaining representative of Respondent's employees.

(b) In any like or related manner interfering with the efforts of the Union to bargain collectively with it on behalf of the employees in the appropriate unit.

2. Take the following affirmative action which is necessary in order to effectuate the policies of the Act:

(a) Furnish American Federation of Television and Radio Artists, Twin Cities Local, as exclusive representative of all employees in the appropriate unit the following information

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[9] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

heretofore requested by the Union: The items requested in numbers 8, 9, and 10 of the Union's 6 January 1986 letter and items 11, 13 and 15 as set forth in the Union's 10 March 1986 letter.

(b) Post at its radio station in Minneapolis, Minnesota, copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms duly signed by a representative of Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. 15 September 1986

MICHAEL O. MILLER
Administrative Law Judge

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[10] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with American Federation of Television and Radio Artists, Twin Cities Local, as the exclusive representatives of our employees in the appropriate unit by failing and refusing upon request to timely furnish it with information relevant and necessary to the performance of its obligations as collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with the efforts of the Union to bargain collectively on behalf of the employees in the appropriate unit.

WE WILL furnish American Federation of Television and Radio Artists, Twin Cities Local, as exclusive representative of all employees in the appropriate unit, the information which it requested in preparation for collective bargaining in its letters of 6 January 1986 and 10 March 1986, to the extent that we have not already done so.

WCCO RADIO, INC., A DIVISION OF
MIDWEST COMMUNICATIONS, INC.

. . . . . .

(Employer)

Dated . . . . . By . . . . . .

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered

by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building—Room 316, 110 South 4th Street, Minneapolis, Minnesota 55401, Telephone No. 612-349-5393.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5125

WCCO RADIO, INC., a Division of
MIDWEST COMMUNICATIONS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Submitted: December 14, 1987
Filed: April 11, 1988

Before JOHN R. GIBSON, BOWMAN, and WOLLMAN, Circuit Judges.

PETITION FOR REVIEW OF NLRB ORDER

BOWMAN, Circuit Judge.

WCCO Radio, Inc. (WCCO or the Company) challenges a decision of the National Labor Relations Board (the Board) which held that WCCO violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(a)(1) , (5), by failing to provide information requested by the American Federation of Television and Radio Artists (AFTRA or the Union). The Board cross-applies for enforce-

ment of its order requiring the Company to supply the requested information. We affirm the Board's decision and enforce its order.

I.

WCCO operates a radio station in Minneapolis. AFTRA is the collective-bargaining representative for a unit of WCCO employees composed of announcers, producers, broadcast journalists, traffic reporters, and broadcast meteorologists. To prepare for upcoming collective bargaining sessions, in January 1986 AFTRA requested ten "items" of information on bargaining unit members. WCCO provided the first six items (and they are not at issue), but refused to supply the remaining four items, which were (7) the retainer fee paid the associate announcer; (8) a list of all programs and the fee that "attaches to" each program for each announcer; (9) a list of the salary, shifts, programs, and fees attaching to each program for every producer, broadcast journalist, and broadcast meteorologist; and (10) a copy of all personal contracts.[1] AFTRA found WCCO's offer of alternative information inadequate and filed a charge with the Board alleging that WCCO had violated the Act by failing to bargain collectively.

Despite the unfair labor practice charge, the Union and Company continued to discuss possible settlements. At the heart of the controversy was a conflict between WCCO's de-

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[1] In a subsequent letter to WCCO, AFTRA clarified its requests. Concerning items (8) and (9), AFTRA wanted a list of all programs performed and the "*actual dollar amount*" paid in fees for each program. Appendix of Petitioner (App.) at A-29 (emphasis in original). Regarding item (10), AFTRA sought not only formal personal service contracts "but also letters of agreement, memoranda of agreement and every kind of agreement, written or oral, between [WCCO] and members of the AFTRA bargaining unit." *Id.*

sire to keep the requested information confidential and AFTRA's need to have the information to perform its collective-bargaining duties. In response to the Company's concerns, AFTRA's Executive Secretary, John Kailin, assured WCCO's General Manager, Clayton Kaufman, that AFTRA would take steps to protect the confidentiality of the information. But Kailin also said that AFTRA could not accept conditions on disclosure that would preclude the Union from using the information to check contract compliance or formulate bargaining proposals.

During one meeting, Kailin renewed AFTRA's previous requests and presented Kaufman with a letter asking for the following additional information (numbered as in the letter): (11) accounting or payroll records containing the actual compensation received by each unit employee from April 1, 1984 through February 28, 1986; (13) current "personnel manual provisions" describing benefits for non-unit employees; and (15) copies of "all payroll or personnel or accounting records" setting forth the number of regular and overtime hours worked by each unit member since April 1, 1983 or the date of the employee's current personal service contract.[2] The letter explained that AFTRA needed this information "to prepare for current contract negotiations" and to consider the "interplay" and 'conflicts" between personal contracts and the collective-bargaining agreement. Appendix of Petitioner (App.) at A-38 to -39. WCCO expressed concern that the information remain confidential.

Discussions aimed at resolving the dispute continued through March and April 1986. During this period a number

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[2] This letter also requested items numbered (12) and (14). The Board found that items (12) and (14) did not exist and that item (15) did not exist for employees working under personal service contracts. The parties do not dispute those findings.

of settlement proposals were considered.[3] The parties were unable, however, to reach an agreement, and eventually they presented the dispute to an administrative law judge (ALJ). The ALJ determined that WCCO had violated sections 8(a)(1) and 8(a)(5) of the Act by failing to timely provide AFTRA with items (7), (8), (9), (10), (11), (13), and (15). His recommended order required WCCO to furnish the information requested in items (8), (9), (10), (11), (13), and (15).[4] The Board affirmed the ALJ's rulings, findings, and conclusions and adopted his recommended order.[5]

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[3] AFTRA said it would strictly limit the number of Union people having access to the information and would protect its confidentiality. WCCO offered to provide the retainer fee (item (7)); the benefit information (item (13)); and the hourly information (item (15)) (as it applied to employees not working under personal service contracts). WCCO was less generous with regard to items (8) through (11). Concerning items (8) and (9), WCCO offered "a copy of the program logs for a representative one week period, 24 hours each day," and a list of all programs and the fees attaching to them. However, WCCO said that AFTRA could determine the "per performance" compensation earned under personal contracts from monthly pension and welfare reports; if that information was insufficient, the Company would supply items (8) and (9) to AFTRA's accountant, provided the accountant agree not to reveal the information to others and use it only to check compliance with the collective-bargaining contract. Regarding item (10), WCCO offered to make available to AFTRA's attorney copies of all personal service contracts and other written agreements, with specific amounts of compensation deleted (except any amount identified as consideration for a covenant not to compete), provided the attorney agree not to reveal the information to others and use it solely to check compliance with the collective-bargaining contract. As for item (11), WCCO offered to disclose some of the payroll data to AFTRA, but data on employees compensated pursuant to personal service contracts would be available solely to AFTRA's attorney and only under the conditions applying to the offer for item (10).

[4] WCCO eventually provided item (7). Item (15) was to be furnished only for employees without personal service contracts. *See supra* n.2.

[5] *See* 282 N.L.R.B. 159.

II.

The scope of our review here is very narrow. We must affirm the Board's decision if it is substantially supported by the evidence and reasonably based in law. *Bauer Welding & Metal Fabricators, Inc. v. NLRB*, 758 F.2d 308, 309 (8th Cir. 1985); *NLRB v. Vincent Brass & Aluminum Co.*, 731 F.2d 564, 566 (8th Cir. 1984).

The central issue of this case is whether WCCO has violated its duty under the Act to bargain in good faith. The duty to bargain in good faith requires, *inter alia*, an employer to furnish information needed by the employees' bargaining representative to perform its duties. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *Procter & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1315 (8th Cir. 1979). The duty "extends to data requested in order properly to administer and police a collective bargaining agreement as well as to requests advanced to facilitate the negotiation of such contracts." *Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 358 (D.C. Cir. 1983). *Accord Procter & Gamble*, 603 F.2d at 1315. Failure to provide such information, in the absence of a valid countervailing reason, constitutes a violation of sections 8(a)(1) and 8(a)(5) of the Act. *See Salt River Valley Water Users' Ass'n v. NLRB*, 769 F.2d 639, 641 (9th Cir. 1985); *New Jersey Bell Tel. Co. v. NLRB*, 720 F.2d 789, 790-91 (3d Cir. 1983); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1094 (1st Cir. 1981); *see also Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318 (1979) (union interests in obtaining information do not always predominate over other interests).

The threshhold question in a case such as this is one of relevance. "If the information requested has no relevance to any legitimate union collective bargaining need, a refusal to furnish it could not be an unfair labor practice." *Emeryville*

Research Center, Shell Dev. Co. v. NLRB, 441 F.2d 880, 883 (9th Cir. 1971). There is little doubt that the information requested by AFTRA is relevant. AFTRA sought data on compensation received, programs performed, and hours worked by unit members.[6] "Information pertaining to the wages, hours and working conditions of employees in the bargaining unit is so intrinsic to the core of the employer-employee relationship that it is considered presumptively relevant." *Procter & Gamble*, 603 F.2d at 1315. *Accord Oil, Chem. & Atomic Workers*, 711 F.2d at 359. Because the information requested by AFTRA was presumptively relevant, WCCO had the burden of proving its irrelevance. *See San Diego Newspaper Guild, Local 95 v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977).

WCCO contends that AFTRA implicitly conceded the irrelevance of the personal contracts and overscale compensation by stating in a report to its members that "[o]nly [Kailin] and [U]nion attorneys would ever *see* any individual contract." App. at A-44 (emphasis in original). WCCO argues that it is inconsistent for AFTRA to insist that the information is relevant to the Union's collective-bargaining responsibilities while promising that the information will not be given to the Union's collective-bargaining representatives. We find this argument unpersuasive. It fails to recognize that Kailin, who would see the personal contracts, is himself the primary negotiator for the Union, and it ignores AFTRA's interest in having the information to check compliance with the collective-bargaining agreement. Moreover, the report explicitly states that AFTRA needs the information to "grieve

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[6] AFTRA also requested "personnel manual provisions" describing benefits for *non-unit* employees. This information would likely help the Union to formulate benefit proposals for unit members and is therefore relevant. *See Proctor & Gamble*, 603 F.2d at 1315.

contract violations" and "negotiate gains for overscale performers." App. at A-44. Far from being an admission of irrelevance, the language WCCO cites was simply intended to indicate that AFTRA would accommodate wishes for confidentiality by handling the information discreetly.[7]

Although the information AFTRA requested is relevant, this does not end our analysis, for an employer's obligation to furnish such information is not absolute. Where, as here, the employer presents reasons for keeping the information confidential, the court should "weigh the competing interests of the employer and the union in the requested information, and the type and extent of disclosure required will depend on 'the circumstances of the particular case.' " *Soule Glass,* 652 F.2d at 1094 (quoting *Detroit Edison,* 440 U.S. at 314-15). This is true for information either shown or presumed to be relevant. *Soule Glass,* 652 F.2d at 1094.

WCCO argues that the requested information should not be furnished for three reasons: (1) some employees prefer that the information remain confidential; (2) the information constitutes trade secrets; and (3) disclosure might result in misuse of the information or employee harassment. We disagree. The need for confidentiality may in some circumstances excuse an employer from providing information needed by a union, but not in this case. Here, WCCO's concerns do not outweigh AFTRA's interest in having the information.

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[7] We also reject WCCO's related argument that it is "contrary to law to hold that Kailin is entitled to information which he promises not to reveal to the [unit] members." Brief of Petitioner at 22. WCCO's argument is based on the notion that all information needed by union representatives to perform their duties must, upon receipt, be disclosed to unit members. WCCO cites no authority supporting that proposition and we decline to embrace it.

One of the consequences of collective bargaining is that it subordinates the particular interests of individual employees to the collective interest of the unit. Hence, a preference for confidentiality on the part of some WCCO employees does not nullify AFTRA's right to the information. *See NLRB v. Jaggars-Chiles-Stovall, Inc.*, 639 F.2d 1344, 1347 (5th Cir.), *cert. denied*, 454 U.S. 826 (1981); *The Detroit News, a Div. of The Evening News Ass'n v. NLRB*, 270 N.L.R.B. 380, 381-82 (1984), *enforced*, 759 F.2d 959 (D.C. Cir. 1985). It does, however, underscore the need to guard against inappropriate disclosure. AFTRA is aware of the confidentiality concerns and has expressed willingness to accommodate them by, for example, offering to limit the number of people who would have access to the information. The Board noted:

> Kailin has repeatedly assured [WCCO] that [AFTRA] understood and appreciated these [concerns] and would accommodate them by appropriate security measures within the Union. There is no reason to doubt the sincerity of the Union's promise to be circumspect in handling this information or to doubt its ability to do so.

App. at A-16. The Board thus has expressed faith in AFTRA's assurances that the Union will handle the information in a manner that adequately protects its confidentiality. On the record before us, we have no basis for believing that the Board's confidence in AFTRA's assurances is misplaced.

WCCO's contention that the information constitutes trade secrets is without merit. The statute WCCO cites defines "trade secrets," in part, as information not "readily ascertainable [through] proper means" by persons who can obtain economic value from its disclosure or use. Minn. Stat. Ann. § 325C.01 subd. 5 (Supp. 1988). Since nothing prohibits disclosure by WCCO employees, competitors can legitimately obtain the information by simply asking the employees for it.

We agree with the Board that "information which may be so freely disclosed at the whim of any employee possessing it" is not a trade secret. App. at A-16.

WCCO's concerns about misuse of the information and employee harassment are likewise without support in the record. The evidence does not suggest that as a result of disclosure employees would be faced with the kind of "clear and present danger" that warrants nondisclosure. *See Soule Glass*, 652 F.2d at 1096-97; *NLRB v. A.S. Abell Co.*, 624 F.2d 506, 510-12 (4th Cir. 1980); *Shell Oil Co. v. NLRB*, 457 F.2d 615, 616-20 (9th Cir. 1972).

In addition to arguing that its confidentiality concerns outweigh AFTRA's need for the information, WCCO contends that it was excused from providing the information because (1) its offers of alternative information were sufficient; (2) AFTRA waived its right to bargain about personal service contracts and overscale compensation; and (3) AFTRA prematurely resorted to the Board. We uphold the Board's rejection of these contentions.

The Board found that the information WCCO offered was incomplete, "not necessarily accurate," and only marginally useful. App. at A-16. The record supports this finding. For example, WCCO's offer to provide program logs for a single week would be of little assistance in determining employees' incomes for an entire year since their assignments frequently vary. Because an employer does not fulfill its duty to disclose by providing only partial or unhelpful information, *see Soule Glass*, 652 F.2d at 1093; *NLRB v. Borden, Inc., Borden Chem. Div.*, 600 F.2d 313, 318 (1st Cir. 1979), by offering what it did WCCO has not satisfied its statutory obligation.

We find no merit in WCCO's assertion that AFTRA waived its right to bargain over personal service contracts and overscale compensation. A waiver of a right to bargain over such

matters must be "clear and unmistakable" and "there must be a conscious relinquishment by the union, clearly intended and expressed to give up that right." *Procter & Gamble*, 603 F.2d at 1318. The record contains no evidence of such an express waiver.

Finally, the record provides substantial support for the Board's rejection of WCCO's argument that AFTRA prematurely resorted to the Board. AFTRA had requested similar information in previous negotiations and WCCO had refused to comply. This time, when WCCO again offered only inadequate alternative information, AFTRA filed the unfair labor practice charge. But even after filing the charge, AFTRA continued to discuss with WCCO possible settlements. AFTRA explained to WCCO why its offers were unacceptable and responded to WCCO's desire for confidentiality by proposing to limit the number of Union people who would receive the information. We do not consider this "stonewalling," but an acceptable attempt to reach a compromise. *See NLRB v. St. Joseph's Hosp.*, 755 F.2d 260, 264-65 (2d Cir.), *cert. denied*, *New York State Nurses Ass'n v. St. Joseph's Hosp.*, 474 U.S. 827 (1985).

The Board's order is ENFORCED.[8]

A true copy.

ATTEST:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[8] Concerning item (15), WCCO argues that "the company responded in full [since] the evidence demonstrates that it keeps no time records for unit members." Brief of Petitioner at 42. This is inconsistent with WCCO's March 18, 1986 offer to disclose item (15) to the Union except insofar as it pertains to employees compensated pursuant to personal service contracts and other similar

AFTRA
American Federation of Television and Radio Artists
Twin Cities Local

REPORT TO AFTRA WCCO RADIO MEMBERS
by John Kailin, Executive Secretary
April 8, 1986

Thanks to your involvement in meetings, hearings and negotiations, AFTRA has held its own and made some very meaningful gains in the past six months.

* Because of our unity with the IBEW the two unions stopped a serious company attempt to begin a phase-out of technicians and to assign their work to us without additional pay.
* We held back company efforts to make us take dubbing and editing duties of the IBEW without negotiations as to procedure, division of labor and compensation.
* We negotiated $15,000 in fee restorations for Ray Christensen and Dick Chapman.
* We presented an articulate and well-researched case to Arbitrator Thomas Gallagher seeking restoration of another $45,000 in fee cuts. A decision is expected in mid to late May.

UNION DEMANDS FULL—AND DISCREET—DISCLOSURE

In the course of the arbitration we discovered that additional fee cuts have been made over the years without the

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agreements. *See* App. at A-10; Respondent's Exhibit 3. Additionally, while the Board found that item (15) did not exist for employees working under personal service contracts, it did not find that there were no time records for *any* unit members. If some unit members do not work under personal contracts and there are time records for these employees, WCCO must provide the information.

union's knowledge or approval. We demanded full disclosure of all fees paid, and copies of all personal service contracts.

These are needed for two reasons: *FIRST:* To enable us to grieve contract violations such as fee cuts or contradictory language regarding discipline, discharge, etc. *SECOND:* To allow us to negotiate gains for overscale performers by improving and adding to the base contract.

How would this personal contract information filter through to the bargaining committee or the general membership? Who would read your contract?

Only the Executive Secretary and union attorneys would ever *see* any individual contract. At no time would your salary be revealed to anyone. This, you will recall, is not a new practice. In its 40 years of existence, AFTRA has never revealed personal salary information.

What would the bargaining unit know? The committee would know general salary levels for the average performer. *Actual salaries and high-end ranges would not be disclosed.* The committee would know aggregate totals for Announcers, Producers, SBJs, et al. Finally, the committee would know about those kinds of perks in personal service contracts that would be helpful to general negotiations, without attaching a name to any specific perk.

* Based on AFTRA's complaint (see enclosed excerpts from the NLRB complaint against the Company) the National Labor Relations Board ordered the Company to turn over such information as being *"necessary for, and relevant to, the Union's performance of its function. . . ."*
Company attorneys refused to do so. They will instead take the matter to hearing on April 28th. Another favorable decision for AFTRA is almost certain, as the law favors the union's position on precisely every defense

raised by the company. Indeed in other markets, station management routinely shares such information with AFTRA.

WRITTEN GUARANTEES OPEN DOOR TO FURTHER DISCUSSION

We did not fully negotiate a new contract, but both sides discussed their priorities. WCCO wants to eliminate the fee system; AFTRA wants to close contract loopholes. But without knowing how much a given job is worth—i.e., the fee being paid—AFTRA would be at a disadvantage. If the unit should ever vote to give up fees, how could we negotiate alternate compensation without a reference point?

To avoid a crisis on April 1 (read: possible strike) we achieved these written guarantees:

* An AFTRA reservation of rights clause establishing that by negotiating for interim wages and fees, AFTRA is in no way waiving its statutory right to full information disclosure.
* An agreement that there will be no more unilateral fee cutting in the life of the Interim Agreement such as happened August 18th.
* An agreement that any fees which Arbitrator Gallagher should order restored will remain in effect after April 1 for the duration of the Interim Agreement.
* Upon resolution by suit or by settlement of the union's labor board case, the contract may be reopened for full negotiations on all items, with retroactivity to April 1, 1986, except on the salaries and fees of the Interim Agreement.
* Before accepting IBEW dubbing and editing duties, AFTRA, IBEW and the company will negotiate compensation amounts and details of the changeover between now and October 1.

A GOOD INTERIM CONTRACT IS NEGOTIATED

It took seven days of negotiations to achieve these protections. They opened the door to talking money. As you know, the membership reviewed and strongly approved the following gains for the interim period. (Depending on how far the company appeals, this period could run for anywhere from about four months to the full three years.)

BASE WAGE INCREASES:

4/1/86 ..... 4.75%
4/1/87 ..... 4.5%
4/1/88 ..... 4 %

FEES:

4/1/86 ..... 4.75%
10/1/87 ..... 4.5%

PENSION AND WELFARE:

Company's contribution to pension rises from 8½% of wage (currently) to 9.25% on 4/1/86.

ALSO: Ceiling on company contributions to pension rises from annual salary of $75,000 to $90,000 on 4/1/86 and to $100,000 on 10/1/87.

NEWS EDITOR FEES:

Rise from $12.00 per day to $16.50 on 4/1/86 and $17.50 on 10/1/87.

STAFF BROADCAST METEOROLOGISTS, FOR WORK DONE OUTSIDE RADIO DUTIES (INCLUDING CABLE T.V.) rises from $10.00 per week to $20.00 per week on 4/1/86 and $25.00 on 10/1/87.

IN ADDITION:

Company now includes AFTRANS on WCCO "Long Term Disability Plan" . . . . provides disability payments amounting to 60% of base wage from the sixth month of disability through age 65.

I cannot overstress the skill and dedication of your Bargaining Committee, without whose participation progress would not have been made.

The committee was co-chaired by Rich Holter, the union's First Vice President, and Steve Murphy, shop steward—a very effective pair. Committee members are Dick Chapman, Sue Frase, Denny Long; and alternate Mary Ann Rentas.

Their work is far from over. From now until October 1st, we will need to study and negotiate the matters regarding the IBEW's duties. In the same period, you need to meet and discuss contract demands to succeed our Interim Agreement. By itself this would not be simple. It may be complicated further by the company's proposal for fee eliminations. In any case our ability to make decisions, negotiate an agreement, or ratify a contract are at this point limited by our lack of relevant information from the company.

Thanks again for your support for the Bargaining Committee.

Fraternally,
JOHN L. KAILIN
Executive Secretary

encl: NLRB excerpts

(2)

Supreme Court, U.S.
FILED
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CLERK

No. 87-2021

In the Supreme Court of the United States

OCTOBER TERM, 1988

WCCO RADIO, INC., A DIVISION OF MIDWEST COMMUNICATIONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded, in the circumstances of this case, that petitioner committed an unfair labor practice by refusing to comply with a request from the union representing petitioner's employees for information concerning petitioner's compensation of employees in the bargaining unit.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Beth Israel Hosp. v. *NLRB*, 437 U.S. 483 (1978) 7

Boston Herald-Traveler Corp. v. *NLRB*, 223 F.2d 58 (1st Cir. 1955), enforcing 110 N.L.R.B. 2097 (1954) 6

Detroit Edison Co. v. *NLRB*, 440 U.S. 301 (1979) 4, 5, 7

Detroit News, a Div. of the Evening News Ass'n, 270 N.L.R.B. 380 (1984), enforced mem., 759 F.2d 959 (D.C. Cir. 1985) 6

E.I. DuPont de Nemours & Co. v. *NLRB*, 744 F.2d 536 (6th Cir. 1984) 5

Electro-Craft Corp. v. *Controlled Motion, Inc.*, 332 N.W.2d 890 (Minn. 1983) 7

Gordon Employment, Inc. v. *Jewell*, 356 N.W.2d 738 (Minn. Ct. App. 1984) 7

Huddleston v. *Dwyer*, 322 U.S. 232 (1944) 8

KCMO Broadcasting, 145 N.L.R.B. 550 (1963) 6

NLRB v. *Acme Industrial Co.*, 385 U.S. 432 (1967) 5

NLRB v. *Truitt Mfg.*, 351 U.S. 149 (1956) 5

NLRB v. *Yawman & Erbe Mfg.*, 187 F.2d 947 (2d Cir. 1951) 5

Oil, Chemical & Atomic Workers Local 6-418 v. *NLRB*, 711 F.2d 348 (D.C. Cir. 1983) 5

Procter & Gamble Mfg. v. *NLRB*, 603 F.2d 1310 (8th Cir. 1979) 5

Radio Station WLOL, 181 N.L.R.B. 560 (1970) 6

San Diego Newspaper Guild v. *NLRB*, 548 F.2d 863 (9th Cir. 1977) 5

Page

Cases – Continued:

Teleprompter Corp. v. *NLRB*, 570 F.2d 4 (1st Cir. 1977) . 5

Statute:

National Labor Relations Act § 8(a)(5), 29 U.S.C. 158(a)(5) 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A33-A42) is reported at 844 F.2d 511. The decision and order of the National Labor Relations Board (Board), including the opinion of the administrative law judge (Pet. App. A1-A33), is reported at 282 N.L.R.B. No. 159.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1988. The petition for a writ of certiorari was filed on June 10, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a radio station in Minneapolis, Minnesota. The American Federation of Television and Radio Artists, Twin Cities Local (Union) represents peti-

tioner's announcers, producers, staff broadcast journalists, staff traffic reporters, and staff broadcast meteorologists. Under the collective bargaining agreement between petitioner and the Union, which expired on March 31, 1986, the employees in the bargaining unit received a base salary and additional fees for the programs that they performed on the air. Fees varied according to the length, frequency, sponsorship, and type of program; some programs paid no fee at all. Pet. App. A5.

The collective bargaining agreement set forth specific salaries and fees for the various classes of performers, but provided that those amounts were only "minimum" terms. The contract permitted individual employees and petitioner to reach separate agreements, known as personal service contracts (PSCs), for compensation in excess of the minimums. Nine of the 35 unit employees reached individual agreements with petitioner. Pet. App. A5.

In January 1986, the Union, in preparation for bargaining for a new contract, requested certain information from petitioner. Among other things, the Union sought information about a retainer fee paid to the associate announcer, a list of all programs performed by the announcers and the fees paid for each of those programs, a list of the "salary, shifts, programs and fees attaching to each program" for the remaining employees, and a copy of all PSCs (Pet. App. A6-A7).[1] The Union wanted to learn the compensation that each unit employee received so that it could determine whether to bargain for higher minimum salaries and fees, and whether petitioner was complying with current contractual minimums (*id.* at A7-A8). When petitioner refused to supply the requested information, the Union filed an unfair labor practice charge (*id.* at A5-A6).

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[1] During contract negotiations in March, the Union amended its request to add other payroll and personnel data pertaining to the actual compensation and terms of employment of the unit employees (Pet. App. A12-A13).

2. The administrative law judge (ALJ) ruled that petitioner violated Section 8(a)(5) of the National Labor Relations Act (29 U.S.C. 158(a)(5)) by failing to supply the Union with the requested information (Pet. App. A29). The ALJ found that the requested information—"the specific details of the compensation of all unit members, including those paid pursuant to personal service contracts" (*id.* at A19)—was presumptively relevant to the Union's function as bargaining representative (*id.* at A20). He found that (*id.* at A21) the Union "needed the information in order to determine whether to bargain for higher minimums or greater benefits and protections in the collective-bargaining agreement applicable to all unit employees * * * [and] to assure itself that the earnings of the employees pursuant to personal service contracts at least met the minimum standards of the collective-bargaining agreement * * *."

The ALJ found that petitioner failed to rebut the presumption of relevance (Pet. App. A20). The ALJ rejected petitioner's contentions that information concerning individually negotiated contracts may be withheld because it is "irrelevant to the negotiations, that [it] might aid competitors in hiring away [petitioner's] employees, and that some employees might object or be offended by disclosure of their earnings to the union" (*id.* at A21). Those contentions, the ALJ noted, "have been raised by other employers and have been consistently rejected by the Board and the courts in strikingly similar cases over the last three decades" (*ibid.*). And the ALJ found that the requested information was not a "trade secret" because the unit employees were "under no proscription which would prohibit them from disclosing [salary and fees] information if they so desired" (*id.* at A26).

The Board affirmed the ALJ's findings and conclusions (Pet. App. A1). Accordingly, the Board ordered petitioner

to give the Union the requested information (*id.* at A2, A30-A31).

3. The court of appeals enforced the Board's order (Pet. App. A42). The court found that "[t]here is little doubt that the information requested by [the Union] is relevant" (*id.* at A38). The court rejected petitioner's contention that the relevancy of the information was rebutted by the Union's offer not to disclose the information to anyone other than its executive secretary and attorney. The court said that petitioner's contention ignored the facts that the executive secretary was the Union's chief negotiator and that the information was also sought to check compliance with the existing contract (*ibid.*). The court of appeals observed that the Union's offer to limit disclosure was simply intended to "accommodate wishes for confidentiality by handling the information discreetly" (*id.* at A39 (footnote omitted)).

Citing *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301 (1979), the court of appeals acknowledged that relevant information may be withheld when an employer's interest in secrecy outweighs the union's need for the information (Pet. App. A39). The court, however, rejected petitioner's contention that the Board had not reasonably weighed the competing interests in this case. The court of appeals agreed with the Board that the requested information was not protected under Minnesota's trade secrets law. The court stated: "Since nothing prohibits disclosure by WCCO employees, competitors can legitimately obtain the information by simply asking the employees for it" (*id.* at A40).

ARGUMENT

The decision of the court of appeals is correct. That decision does not conflict with any decision of this Court or the courts of appeals. Thus, no further review is warranted.

1. It is well settled that "[t]he duty to bargain collectively, imposed upon an employer by § 8(a)(5) of the Na-

tional Labor Relations Act, includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative." *Detroit Edison Co.* v. *NLRB*, 440 U.S. at 303 (footnote omitted). Accord *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *NLRB* v. *Truitt Mfg.*, 351 U.S. 149, 152 (1956). Petitioner does not dispute that point.

Nor does petitioner dispute that "[i]nformation pertaining to the wages, hours and working conditions of employees in the bargaining unit is so intrinsic to the core of the employer-employee relationship that it is considered presumptively relevant." *Procter & Gamble Mfg.* v. *NLRB*, 603 F.2d 1310, 1315 (8th Cir. 1979). Accord *Oil, Chemical & Atomic Workers Local 6-418* v. *NLRB*, 711 F.2d 348, 359 (D.C. Cir. 1983); *Teleprompter Corp.* v. *NLRB*, 570 F.2d 4, 8 (1st Cir. 1977); *San Diego Newspaper Guild* v. *NLRB*, 548 F.2d 863, 867 (9th Cir. 1977); *NLRB* v. *Yawman & Erbe Mfg.*, 187 F.2d 947, 949 (2d Cir. 1951) (footnote omitted) ("[W]e find it difficult to conceive a case in which current or immediately past wage rates would not be relevant during negotiations for a minimum wage scale or for increased wages.").

Petitioner's contention (Pet. 8-12), instead, is the fact-specific one that it proved that the Union does not need the requested information in this case. As the court of appeals held, however, the Board's finding of relevance here is supported by substantial evidence.[2]

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[2] Relevance in this context is measured by a "discovery-type standard" (*NLRB* v. *Acme Indus. Co.*, 385 U.S. at 437). And the "Board's determination concerning whether information is relevant to the collective bargaining process is entitled to deference from the courts." *E.I. DuPont de Nemours & Co.* v. *NLRB*, 744 F.2d 536, 538 (6th Cir. 1984) (collecting cases).

Contrary to petitioner's assertion (Pet. 8), the fact that the Union did not express an interest in negotiating PSCs does not show that the requested information is irrelevant. The Board, with court approval, has consistently found that the terms of individually negotiated contracts are relevant to a union's task of negotiating minimum employment terms for all members of the bargaining unit. See *Detroit News, a Div. of the Evening News Ass'n*, 270 N.L.R.B. 380, 380-382 (1984), enforced mem., 759 F.2d 959 (D.C. Cir. 1985); *Boston Herald-Traveler Corp.* v. *NLRB*, 223 F.2d 58, 58-63 (1st Cir. 1955), enforcing 110 N.L.R.B. 2097 (1954); *Radio Station WLOL*, 181 N.L.R.B. 560, 560-562 (1970); *KCMO Broadcasting*, 145 N.L.R.B. 550, 551-553 (1963). Thus, as the Board and the court of appeals noted (Pet. App. A21, A38-A39), even if the Union had no intention of negotiating PSCs, the requested information was relevant to the Union's formulation of its proposals for contractual minimums and to its supervision of petitioner's compliance with the collective bargaining agreement.

Moreover, the Board's finding of relevance is not unsupported by the record simply because the Union's executive secretary gave assurances that individual wage data would not be disclosed to persons in the bargaining unit. As the court of appeals observed (Pet. App. A38-A39), he gave such assurances to accommodate concerns about confidentiality. And because the executive secretary was the Union's chief negotiator, the Union's decision to limit dissemination would not prevent the Union from using the information for its intended purposes.[3]

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[3] There is no basis for petitioner's assertion (Pet. 9-11) that the executive secretary is required by the duty of fair representation to disclose the requested information to employees in the bargaining unit. The cases cited by petitioner (*ibid.*) deal with the situation in which a union allegedly has violated its duty of fair representation by

2. Petitioner argues (Pet. 12-15) that the Board erred by concluding that the Union's need for the requested information outweighs petitioner's interest in secrecy. But, as the Court has often stressed, " 'balancing * * * conflicting legitimate interests * * * to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.' " *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 501 (1978) (citation omitted). The Board did not abuse its discretion in this case.

Petitioner relies on Minnesota's trade secrets law (Pet. 14-15), but it cites no case holding that its employees' salaries are trade secrets.[4] Indeed, as petitioner acknowledges (Pet. 14), confidential information is a trade secret only if it "is the subject of reasonable efforts to maintain its secrecy." This requirement means, inter alia, that the employees must be under a "duty" not to disclose the information. *Electro-Craft Corp.* v. *Controlled Motion, Inc.*, 332 N.W.2d 890, 901 (Minn. 1983). Accord *Gordon Employment, Inc.* v. *Jewell*, 356 N.W.2d 738, 741 (Minn. Ct. App. 1984). As the court of appeals noted (Pet. App. A26), however, petitioner's employees

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misrepresenting or intentionally concealing the terms or consequences of an agreement with an employer to the detriment of employees. No such detriment is suggested here. In any event, even if petitioner's assertion were correct, it would not bear on the relevance of the requested information, but on the executive secretary's ability to meet his confidentiality commitment.

[4] Whether petitioner has a duty to provide the requested information is, of course, ultimately a question of federal law. See, *e.g.*, *Detroit Edison Co.* v. *NLRB*, 440 U.S. at 314-317.

are free to disclose their employment terms to petitioner's competitors. Hence, the court of appeals correctly held that the Board reasonably rejected petitioner's claim of privilege based on Minnesota law.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1988

[5] Of course, this Court generally does "not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts * * *." *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944).

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